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Earmark Disclosure Rules in the Senate: Member and Committee Requirements

Megan S. Lynch
Analyst on Congress and the Legislative Process

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Summary

Earmark disclosure rules in both the House and the Senate establish certain administrative responsibilities that vary by chamber. Under Senate rules, a Senator requesting that an earmark be included in legislation is responsible for providing specific written information, such as the purpose and recipient of the earmark, to the committee of jurisdiction. Further, Senate committees are responsible for compiling and presenting such information in accord with Senate rules. In the Senate, disclosure rules apply to any congressional earmark, limited tax benefit, or limited tariff benefit included in either the text of a bill or any report accompanying the measure, including a conference report and joint explanatory statement. The disclosure requirements apply to earmarks in appropriations legislation, authorizing legislation, and tax measures. Furthermore, they apply not only to measures reported by committees but also to measures not reported by committees, floor amendments, and conference reports. This report will be updated as needed.

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Introduction

Earmark[1] disclosure rules in both the House and Senate were implemented with the stated intention of bringing more transparency to congressionally directed spending. The administrative responsibilities associated with these new rules vary by chamber. This report outlines the major administrative responsibilities of Senators and committees of the Senate associated with the chamber's earmark disclosure rules.[2]

Senate Earmark Disclosure Rule

Senate Rule XLIV[3] prohibits a vote on a motion to proceed to consider a measure or a vote on adoption of a conference report, unless the chair of the committee or the majority leader (or designee) certifies that a complete list of earmarks and the name of each Senator requesting each earmark is available on a publicly accessible congressional website in a searchable form at least 48 hours before the vote. If a Senator proposes a floor amendment containing an additional earmark,[4] those items must be printed in the *Congressional Record* as soon as "practicable."[5]

Rule XLIV, paragraph 5, explicitly defines congressionally directed spending item, limited tax benefit, and limited tariff benefit as follows:

> **Congressionally directed spending item-** a provision or report language included primarily at the request of a Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or congressional district, other than through a statutory or administrative formula driven or competitive award process.
>
> **Limited tax benefit**- any revenue provision that (A) provides a federal tax deduction, credit, exclusion, or preference to a particular beneficiary or limited group of beneficiaries under the Internal Revenue Code of 1986, and (B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision.
>
> **Limited tariff benefit**- a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.

[1] In Senate rules, the phrase "congressionally directed spending item" is used in place of earmark. For the purposes of this report, the terms will be used interchangeably. From this point forward, the term *earmark* refers to any congressionally directed spending item, limited tax benefit, or limited tariff benefit.

[2] This report discusses requirements and restrictions imposed by Senate rules. It does not cover requirements or restrictions articulated in committee or party rules.

[3] The Senate included this rule in the Honest Leadership and Open Government Act of 2007, which became law on September 14, 2007 (Section 521 of P.L. 110-81, 121 Stat.760).

[4] The rule does not apply to all earmarks in floor amendments, only those "not included in the bill or joint resolution as placed on the calendar or as reported by any committee, in a committee report on such a bill or joint resolution, or a committee report of the Senate on a companion measure," as stated in Rule XLIV, paragraph 4(a).

[5] The rule does not define the term *practicable*.

If the earmark certification requirements have not been met, a point of order may lie against consideration of the measure or vote on the conference report. A point of order would not apply to floor amendments.

Legislation Subject to the Rule

Senate earmark disclosure rules apply to any congressional earmark included in either the text of the bill or the committee report accompanying the bill, as well as the conference report and joint explanatory statement. The disclosure requirements apply to items in authorizing legislation, appropriations legislation, and tax measures. Furthermore, they apply not only to measures reported by committees but also to unreported measures, amendments, House bills, and conference reports.

Requirements for Senators Submitting Earmark Requests

Under Senate Rule XLIV, paragraph 6, a Senator requesting that a congressional earmark be included in a measure is required to provide a written statement to the chair and ranking minority member of the committee of jurisdiction that includes

- the Senator's name;
- the name and address of the intended earmark recipient (if there is no specific recipient, the location of the intended activity should be included);
- in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit to the extent known to the Senator;
- the purpose of the earmark; and
- a certification that neither the Senator nor the Senator's immediate family has a financial interest in such an earmark.[6]

It is important to note that, when submitting earmark requests, individual committees and subcommittees often have their own additional administrative requirements beyond those required by Senate rules (e.g., prioritizing requests or submitting request forms electronically). The Senate Appropriations Committee, for example, has stated that it will require Members requesting earmarks to post information regarding their earmark requests on their personal website. This information must be posted at the time of the request and must include the purpose of the earmark and why it is a valuable use of taxpayer funds.[7]

[6] For more information on the definition of "immediate family," see *Definition of "Immediate Family" for Requested Appropriations*, released by the Senate Select Committee on Ethics, September 12, 2007, available at http://www.ethics.senate.gov.

[7] As stated in the January 6, 2009, joint press release from the House and Senate Appropriations Committees chairmen titled *House and Senate Appropriations Committees Announce Additional Reforms in Committee Earmark Policy*, available at http://appropriations.house.gov/pdf/Obey-InouyeRelease01-06-09.pdf.

The committees may also establish relevant policy requirements (e.g., requiring matching funds for earmark requests) or restrictions (e.g., not considering earmark requests for certain appropriations accounts or disallowing multi-year funding requests). In addition, committees and subcommittees often have deadlines, especially for earmark requests in appropriations legislation. For this reason, it is important to check with individual committees and subcommittees to learn of any supplemental earmark request requirements or restrictions.[8]

The committee of jurisdiction is responsible for identifying earmarks in the legislative text and any accompanying reports. Therefore, when it is not clear whether a senatorial request constitutes an earmark, the committee of jurisdiction may be able to provide guidance.

When submitting an earmark request, it may be relevant whether the Senator wants the earmark to be included in the text of the bill or the committee report accompanying the bill. Committees may make an administrative distinction between these two categories in terms of the submission of earmark requests, and there may be policy implications of an earmark's placement in either the bill text or the committee report. For example, under Executive Order 13457,[9] issued in January 2008, executive agencies are directed not to commit, obligate, or expend funds that were the result of an earmark included in non-statutory language, such as a committee report.[10]

If, during consideration of a measure, a Senator proposes an amendment[11] that contains an additional earmark,[12] the Senator shall ensure that a list of earmarks (and the name of any other Senator who submitted a request for each earmark included) is printed in the *Congressional Record* as soon as "practicable."

Requirements for Committees

Under the Senate rule, earmark disclosure responsibilities of Senate committees and conference committees fall into three major categories: (1) determining if a spending provision is an earmark; (2) compiling earmark requests for presentation,[13] and (3) certifying that requirements under Rule XLIV have been met.

Committees of jurisdiction may use their discretion to decide what constitutes an earmark. Definitions in Senate rules, as well as past earmark designations during the 110th Congress, may provide guidance in determining if a certain provision constitutes an earmark.

[8] Often these requirements are communicated through a "Dear Colleague" letter, committee staff memos, or the committee's website.

[9] Executive Order 13457, "Protecting American Taxpayers from Governmental Spending on Wasteful Earmarks," 73 *Federal Register* 22, January 29, 2008.

[10] For further information, see CRS Report RL34373, *Earmarks Executive Order: Legal Issues*, by Thomas J. Nicola and T. J. Halstead.

[11] Including amendments in the nature of a substitute.

[12] The rule does not apply to all earmarks in floor amendments. It applies only to those "not included in the bill or joint resolution as placed on the calendar or as reported by any committee, in a committee report on such a bill or joint resolution, or a committee report of the Senate on a companion measure," as stated in Rule XLIV, paragraph 4(a).

[13] In the case of an earmark in any classified portion of a report accompanying a measure, paragraph 7 of Senate Rule XLIV states that the committee of jurisdiction should, to the greatest extent practicable, consistent with the need to protect national security—including intelligence sources and methods—include an unclassified program description, funding level, and name of the Senate sponsor.

Senate Rule XLIV states that before consideration is in order on a measure or conference report, a list of included earmarks and their sponsors must be identified through lists, charts, or some means and made available on a publicly accessible congressional website for at least 48 hours.[14] The Senate Appropriations Committee has stated that it will make earmark disclosure tables publicly available the same day that a subcommittee reports the bill.[15] In the case of measures, the list of earmarks (and Senate sponsors) on the congressional website must be "searchable." Lists associated with conference reports should also be in a searchable format but only to the extent it is technically feasible. Senate rules state that a committee report containing a list of earmarks (and their sponsors) that is available online satisfies the disclosure requirement. The rule also requires the applicable committee to make the certifications of no financial interest available online. The rule does not specify how long after consideration any of these required materials must be maintained.

The rule states that consideration of a measure or conference report is not in order until the applicable committee chair or the majority leader (or designee) "certifies" that the requirements stated above have been met. While the rule does not state what constitutes certification, it has been the practice of the committee chair to make a statement on the Senate floor or submit a written statement to be printed in the *Congressional Record* confirming compliance with Rule XLIV's disclosure requirements. An example of a certification letter is provided below.

U.S. SENATE, COMMITTEE ON AGRICULTURE,
NUTRITION, AND FORESTRY,
Washington, DC, November 5, 2007.

I certify that the information required by Senate Rule XLIV, related to congressionally directed spending in S. 2302 has been available on a publicly accessible website in a searchable format for at least 48 hours before a vote on the pending bill.

TOM HARKIN,
Chairman.

Source: *Congressional Record*, daily edition, vol. 153 (November 5, 2007), p. S13751.

[14] Rule XLIV, paragraph 4(b), states that when a committee reports a measure, the earmark list should be made available online in a searchable format as soon as "practicable." The rule does not define *practicable*.

[15] In the case that the appropriations legislation has not been marked up by a subcommittee, the Senate Appropriations Committee will make earmark disclosure tables publicly available 24 hours before full committee consideration of the bill, as stated in the January 6, 2009, joint press release.

Author Contact Information

Megan S. Lynch
Analyst on Congress and the Legislative Process
mlynch@crs.loc.gov, 7-7853